No 09-788

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY
Petitioner

v.

THOMAS DAVID JORDAN,
Respondent

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I THE DECISION BELOW WIDENS A CONFLICT OVER FELA'S CAUSATION STANDARD AND CONFLICTS WITH THIS COURT'S PRECEDENTS	1
II THE DECISION BELOW DEEPENS AN ENTRENCHED DIVISION OF AUTHORITY OVER FELA'S NEGLIGENCE STANDARD	8
CONCLUSION	12
SUPPLEMENTAL APPENDIX	
SUPPLEMENTAL APPENDIX A Tr. of Objections to Court's Charge, *Jordan* v *BNSF*, No. CT004175-03D2 (Tenn. Cir. Ct. Feb. 7-8, 2006) (excerpts)	1a
SUPPLEMENTAL APPENDIX B Def. Norfolk Southern Railway Company's Rule 50.02 and 59.02 Motions, *Jordan* v *BNSF*, No. CT004175-03D2 (Tenn. Cir. Ct. filed May 2005) (excerpt)	12a
SUPPLEMENTAL APPENDIX C Br. of Appellant Norfolk Southern Railway Company, *Jordan* v *BNSF*, No. CT004175-03 (Tenn. Cir. Ct. filed Aug. 10, 2007) (excerpt)	15a

TABLE OF AUTHORITIES

CASES — Page

Am Dredging Co v *Miller* 510 U S 443 (1994) 3
Carter v *Atlanta & St Andrews Bay Ry* 338 U S 430 (1949) 4
Coffey v *Ne Ill Regl Commuter R R (Metra)* 479 F 3d 472 (7th Cir 2007) 9
Consol Rail Corp v *Gottshall* 512 U S 532 (1994) 5
Coray v *S Pac Co* 335 U S 520 (1949) 5
CSX Transp Inc v *Hensley* 129 S Ct 2139 (2009) 3
Deserant v *Cerillos Coal R R* 178 U S 409 (1900) 11
Gardner v *CSX Transp Inc* 498 S E 2d 473 (W Va 1997) 2
Hileman v *Pittsburgh & Lake Erie R R* 685 A 2d 994 (Pa 1996) 11
Lavender v *Kurn* 327 U S 645 (1946) 5
Marazzato v *Burlington N R R* 817 P 2d 672 (Mont 1991) 3
Metro North Commuter R R v *Buckley* 521 U S 424 (1997) 5
Monessen S W Ry v *Morgan* 486 U S 330 (1988) 5
Montgomery v *CSX Transp Inc* 656 S E 2d 20 (S C 2008) 9
Norfolk & W Ry v *Ayers* 538 U S 135 (2003) 5
Norfolk S Ry v *Sorrell* 549 U S 158 (2007) 1 2 5 9
Raab v *Utah Ry* 221 P 3d 219 (Utah 2009) 3
Rogers v *Mo Pac R R* 352 U S 500 (1957) 2

TABLE OF AUTHORITIES—continued

Page

Seeberger v *Burlington N R R* 982 F 2d 1149 (Wash 1999) 11

Syverson v *Consol Rail Corp* 19 F 3d 824 (2d Cir 1994) 4

Tennant v *Peoria & Pekin Union Ry* 321 U S 29 (1944) 5

Urie v *Thompson* 337 U S 163 (1949) 5

Webb v *Ill Cent R R*, 352 U S 512 (1957) 5

OTHER AUTHORITY

Admin Office of U S Courts, *Annual Report of the Director Judicial Business of The United States Courts* (2008), *available at* http //www uscourts gov/judbus2008/appendices/C02ASep08 pdf 3

REPLY BRIEF

In the petition Norfolk Southern demonstrated deep and acknowledged divisions of authority over the principal elements of a FELA claim—(1) whether FELA replaced ordinary common law causation with "slightest" causation and (2) whether FELA abrogated traditional common law negligence in favor of "slightest negligence Jordan does not meaningfully contest the existence of either conflict Instead the Brief in Opposition focuses principally on various claimed procedural obstacles None however is substantial The issues were litigated below and at Jordan's behest and over Norfolk Southern's objection the court gave a jury instruction that erroneously employed the same even the slightest language that has bedeviled the lower courts. Pet App 69a 70a and sharply divided this Court *see Norfolk S Ry v Sorrell* 549 U S 158 172 77 (2007) (Souter J , concurring), *id* at 178 (Ginsburg, J concurring in the judgment) Compounding the prejudice this instruction applied only to Norfolk Southern in stark contrast to a common law causation instruction that governed Jordan's negligence claim against Burlington Northern

The petition should be granted to provide clarity in this area of continuing confusion on an issue that arises in virtually every FELA case

I THE DECISION BELOW WIDENS A CONFLICT OVER FELA'S CAUSATION STANDARD, AND CONFLICTS WITH THIS COURT'S PRECEDENTS

A There exists a decades old division of authority over whether FELA requires a showing of common law proximate cause or instead has substituted relaxed or slightest' causation (as Jordan advocated

below) At least seven state supreme courts hold that a FELA plaintiff must show that his injuries were proximately caused by the railroad's negligence Pet 11 12 & n 5 In direct conflict various federal courts of appeals have mistakenly interpreted *Rogers* v *Missouri Pacific Railroad*, 352 U S 500 (1957) as relaxing FELA's causation standard Pet 12 14 Jordan grudgingly concedes "that there is some disagreement on the exact meaning of *Rogers* Opp 17 *id* 18 19 His arguments therefore seek only to distract from not deny the conflict In any event they fail

First Jordan observes that some cases that embrace proximate causation also cite *Rogers* *Id* 20 & n 11 But this would be significant only if *Rogers* were irreconcilable with proximate cause which it is not Pet 20 21 *Sorrell* 549 U S at 175 (Souter J concurring) More to the point that is the question presented for this Court's resolution on the merits What matters here is that various courts understand *Rogers* and proximate cause to be entirely compatible [1] and this understanding conflicts clearly with courts that read *Rogers* as abrogating proximate cause

Second Jordan argues that "there is no conflict among the lower courts in practice" Opp 20 His argument appears to be that even courts expressly *saying* that proximate cause is required apply some lesser standard in practice So for instance, Jordan

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[1] For instance in *Gardner* v *CSX Transportation Inc* the West Virginia Supreme Court both cited *Rogers* and correctly held that "to prevail on a claim under [FELA] a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately in whole or in part to plaintiff's injury" 498 S E 2d 473 483 (W Va 1997)

argues that in *Raab* v *Utah Railway* 221 P 3d 219 (Utah 2009) the Utah Supreme Court "applied what can only be described as a relaxed standard, Opp 20 21 But it is unclear what makes *Raab*'s factual analysis relaxed" And more fundamentally *Raab* squarely rejected the plaintiff's request for a "relaxed standard held that there is no statutory support for reading *Rogers* as eliminating the requirement of proximate causation' and explained that 'such a reading would be contrary to the Court's announced interpretive approach to FELA" 221 P 3d at 225 & n 14, 229, *accord Marazzato* v *Burlington N R R* 817 P 2d 672 674 75 (Mont 1991) Jordan may not perceive any conflict here but *Raab* expressly did 221 P 3d at 230

Third Jordan disparages the issue as 'academic, 'unimportant, and 'arcane Opp 21 On the contrary this issue arises repeatedly, as demonstrated by the numerous authorities addressing the issue Pet 10 15 & nn 5 7 Hundreds of FELA cases are filed each year in federal court [2] in addition to numerous FELA cases filed in state court and the Jones Act cases employing the same standards [3] Causation is an element in each It is commonplace that juries are presumed to follow their instructions *CSX Transp Inc* v *Hensley* 129 S Ct 2139 2141 (2009) (per curiam)—which surely is why Jordan fought the issue so hard below Supp App 6a Indeed Jordan

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[2] *See* Admin Office of U S Courts *Annual Report of the Director Judicial Business of the United States Courts* tbl C 2A at 146 (2008) *available at* http //www uscourts gov/judbus2008/appendices/C02ASep08 pdf (more than 3300 federal FELA cases filed from 2004 2008)

[3] *See Am Dredging Co* v *Miller* 510 U S 443 456 (1994) (Jones Act adopts the entire judicially developed doctrine of liability under [FELA]" (internal quotation marks omitted)

ultimately concedes that [t]he reporters are filled with FELA cases in which causation is truly at issue" Opp 16 It therefore is no surprise that the outcome of FELA cases indeed turns on the causation standard In *Syverson* v *Consolidated Rail Corp* for instance, the Second Circuit reversed summary judgment for the railroad Although it would have affirmed dismissal 'had this been a negligence action at common law" reversal was required under FELA's "substantially diluted" and 'relaxed' causation standard FELA permits liability for risks that would be too remote to support liability under common law" 19 F 3d 824 825 28 (2d Cir 1994) *accord* AAR Br 7 10 (discussing cases in which the causation standard was critical) An outcome determinative legal standard that has hopefully divided the lower courts is precisely the type of issue this Court should grant certiorari to decide

B Review additionally is warranted because the slightest causation standard conflicts with this Court's precedents The Court repeatedly has held that FELA requires a showing of proximate cause Pet 19 22 & n 11 Notably Jordan does not dispute this showing Instead he responds that there also 'are numerous cases (many decided before *Rogers*) in which this Court unmistakably applied a relaxed [causation] standard" Opp 22 23 & n 13 If this were true then there would exist a conflict in this Court's precedents that only this Court could resolve And that would be more reason not less, to grant the petition

In fact however not one of the cases cited by Jordan purports to "appl[y] a relaxed causation standard" At least three of them specifically articulate proximate cause as the governing standard See *Carter* v *Atlanta & St Andrews Bay Ry* 338 U S

430 435 (1949) *Coray* v *S Pac Co* 335 U S 520 523 (1949), *Tennant* v *Peoria & Pekin Union Ry* 321 U S 29 32 (1944) *cf* Pet 20 21 & n 10 Others say nothing about proximate cause at all [4] Jordan's point again seems to be that whatever standard the Court articulated the one it actually applied was 'relaxed Even were this true—and how Jordan determines what constitutes 'relaxed causation he does not explain—it does not remotely suffice to overcome the numerous cases in which this Court specifically has stated that FELA requires proximate cause See Pet 19 20 & n 11

Given the clarity of these precedents Jordan ultimately is forced to attack the 'rule that FELA adopted then existing common law except where otherwise stated Opp 23 But that is precisely the rule this Court has articulated on six or more occasions *E g Sorrell*, 549 U S at 165 66 (Absent express statutory language to the contrary the elements of a FELA claim are determined by reference to the common law '), *Urie* v *Thompson* 337 U S 163 182 (1949) [5] Critical here FELA did not abrogate the common law standard of proximate causation which therefore governs

C Having presented no serious argument to counteract the showing of a split of authority and a con

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[4] *Webb* v *Illinois Central Railroad* far from rejecting proximate cause explained that "we do not think that the case presents an issue of causation and simply quoted *Rogers* 352 U S 512 515 16 (1957) And *Lavender* v *Kurn* articulated no special rule for FELA cases but spoke generally about inferences that factfinders may draw 327 U S 645 651 (1946)

[5] *Accord Norfolk & W Ry* v *Ayers* 538 U S 135 145 (2003) *Metro North Commuter R R* v *Buckley* 521 U S 424 429 (1997) *Consol Rail Corp* v *Gottshall* 512 U S 532 544 (1994) *Monessen S W Ry* v *Morgan* 486 U S 330 337 38 (1988)

flict with this Court's precedents. Jordan is left to offer arguments why ultimately he would prevail on the merits. Opp. 7-17. These arguments are premature at this stage and mistaken in any event.

1. Jordan first contends that, whatever the propriety of a "slightest" cause standard, the jury instructions in fact required "common law proximate cause." *Id.* 7 (capitalization omitted). There can be no question, however, that the court instructed the jury to apply slightest causation:

> [FELA] imposes liability on the railroad employer "when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence *even the slightest* on the part of the employer."

Pet. App. 70a (emphasis added). Nor can Jordan be heard to argue that this instruction embodies anything other than relaxed causation. Jordan himself advocated this language precisely because it embodies such a standard:

> That is the standard of causation under the FELA which is exactly the point I was driving home a minute ago. It says "Legal cause of damage"—we can go pull *Rogers*, you just read from that and that's what it said. That's what *Rogers* and the United States Supreme Court and every court that's interpreted it says:
>
> "Legal cause of damage or complaint. Any part *no matter how small,—and that's really the standard*—in bringing about or actually causing the injury or damage."

Supp. App. 6a (emphasis added).

Jordan notes that elsewhere, the court instructed the jury that "'[i]n order to find that it was a proximate cause' you must find that the injury was the

natural and probable consequence of the railroad's negligence" Opp 8 Thus, he says 'the trial court's causation instruction was in substance a proximate cause instruction *Id* But the remainder of the instructions served only to emphasize the relaxed nature of the causation standard applied against Norfolk Southern The jury charge distinguished repeatedly between the standards applicable to Norfolk Southern under FELA, and those applicable to Jordan's separate common law negligence claim against Burlington Northern *Compare, e g* Jordan App 17a ("[t]he instructions I am about to give you apply exclusively between the plaintiff employee and [Norfolk Southern] and are "based upon [FELA]') *with id* 26a (FELA has no application to Burlington Northern "plaintiff's theory against [Burlington Northern] is under common law negligence) *and id* 27a (common law negligence requires 'proximate or legal cause) Burlington Northern, of course was found not liable And if it were true as Jordan posits that the jury considered both the 'even the slightest' standard and also the earlier instruction on legal cause when evaluating Norfolk Southern's liability which is improbable the internal contradiction in the instructions is more reason to vacate and remand

2 Jordan further argues that causation was never seriously contested at trial" Opp 15 But that is an issue to be determined by a properly instructed jury And it is incorrect in any event A principal focus of Norfolk Southern's closing argument was that its conduct was not the cause of Jordan's injuries *See* generally Trial Tr at 2022 31 *Jordan* v *BNSF* No CT004175 03D2 (Tenn Cir Ct Feb 8 2006) The argument could not have been more directly stated [W]hen you think about it when you analyze the evidence the evidence shows that close [railroad

track] clearances did not—[were] not a legal cause of this accident" *Id* 2022

Furthermore, Norfolk Southern argued that Burlington Northern's failure to use its headlight and bell caused Jordan's injuries Pet App 6a 7a The evaluation of this argument necessarily was affected when the court instructed the jury to apply different causation standards to Norfolk Southern and Burlington Northern *Supra* 6 7 cf also Jordan App 16a (in assessing fault the jury should consider [w]hose conduct more directly caused the injury to the plaintiff) Far from causation not being contested these two causation arguments were a centerpiece of Norfolk Southern's defense at trial

3 Finally, Jordan argues that the use of the phrase "even the slightest" related to 'a negligence instruction not a causation instruction Opp 14 For the reasons discussed next the use of a relaxed negligence standard presents an even starker conflict than relaxed causation, and finds even less support in this Court's precedents If Jordan is right this is further reason that the petition should be granted

II THE DECISION BELOW DEEPENS AN ENTRENCHED DIVISION OF AUTHORITY OVER FELA'S NEGLIGENCE STANDARD

A The petition also demonstrates even deeper division over whether FELA embraces a 'slightest negligence standard (in addition to slightest *causation*) Pet 15 18 After Jordan's Brief in Opposition it could not be clearer that this issue merits the Court's attention He does not even attempt to dispute the existence of the entrenched circuit split He also presents no serious argument that this Court has embraced "slightest negligence which it has not See *id* 22 23 On the contrary ' [s]o far as negli

gence is concerned that standard is the same—ordinary prudence—for both Employee and Railroad alike " *Sorrell* 549 U S at 169 (quoting *Page* v *St Louis Sw Ry* 349 F 2d 820 823 (5th Cir 1965)) Notably even some courts that have adopted the erroneous slight causation standard have rejected slight negligence as inconsistent with FELA and *Rogers E g Montgomery* v *CSX Transp Inc* 656 S E 2d 20 26 28 (S C 2008) see also *Coffey* v *Ne Ill Reg l Commuter R R (Metra)* 479 F 3d 472 476 (7th Cir 2007) This issue plainly warrants the Court's attention and the fact that Jordan does not argue otherwise speaks volumes

B Jordan focuses his attention upon claimed defects in the presentation of the issues These arguments likewise fail

1 Jordan first argues that the issue was insufficiently preserved Opp 26 27 Specifically he says Norfolk Southern never once suggested that instruction affected the negligence standard *Id* 26 On the contrary Norfolk Southern s trial counsel broadly objected to any use of the term 'even the slightest Supp App 5a 6a 8a He specifically linked that phrase to 'the railroads duties *id* 6a and to the 'railroad s exposure to negligence standards *id* 8a In response Jordan s counsel himself recognized that the phrase "even the slightest 'talks about the *duty* of the railroad under [FELA] ' *Id* 10a (emphasis added) In posttrial motions Norfolk Southern likewise objected to the instruction as incorrectly stating [t]he degree of negligence to be applied in this case *Id* 14a

Most importantly Jordan effectively concedes that the point was preserved He says that Norfolk Southern made this argument for the first time 'in its Court of Appeals rebuttal brief ' Opp 26 But nearly

the same language that Jordan admits raised the issue appears in Norfolk Southern's opening brief on appeal.[6] Nor did the court of appeals find the issue waived although Jordan claimed waiver there too on the contrary, and as Jordan recognizes the court simply misunderstood the issue *Id* 26 27 That an appellate court conflated slight cause with slight negligence is further evidence that this Court needs to bring clarity to the issue

2 Jordan further argues that the focus on slight negligence "did not have any effect" given that negligence was "previously[] defined elsewhere in the instructions *Id* 27 This argument is quickly dismissed Jordan fought tooth and nail to have the phrase 'even the slightest' included in the jury instruction Supp App 2a 6a Indeed he argued that it would be reversible error to omit it When during a discussion of instructions concerning 'the railroads duties," Norfolk Southern asked the court to remove the phrase "even the slightest" Jordan's counsel responded that he "would welcome you to take that out because I'll win on appeal" *Id* 6a Having gotten the instruction he fought for Jordan cannot now argue that it was meaningless

To the extent Jordan's point is that the instructions were self contradictory this illustrates confusion warranting this Court's attention In fact however

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[6] *Compare* Supp App 18a ("In the instant case the trial court instructed the jury based upon the so called watered down version of causation and negligence Justice would not be served by allowing a $4 000 000 verdict to stand on an incorrect standard of causation and negligence") *with* Opp 26 ("[t]he trial court incorrectly instructed the jury based upon the so called "watered down" version of causation and negligence" (quoting Norfolk Southern's reply brief on appeal))

the meaning of the instruction could not be clearer The court instructed the jury that FELA

> imposes liability on the railroad employer when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence *even the slightest* on the part of the employer

Pet App 70a (emphasis added) This language was a clear invitation to the jury to impose liability based on some lesser quantum of negligence than otherwise would be required as the courts embracing slight negligence recognize [7] That the instruction elsewhere also discusses negligence in general terms see Jordan App 25a does not remotely lessen the error of the "slightest negligence standard E g *Deserant* v *Cerillos Coal R R* 178 U S 409 421 (1900) (reversible error where the relevant legal principle was properly stated in the general instruction but "materially modified in the application portion of the instructions)

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[7] *See Hileman* v *Pittsburgh & Lake Erie R R* 685 A 2d 994 995 96 (Pa 1996) ("the slightest bit of negligence is sufficient for a finding of liability under the FELA") *see also Seeberger* v *Burlington N R R* 982 P 2d 1149 1150 (Wash 1999) (providing that FELA "requires the worker provide only slight evidence his injuries were foreseeably the result of the railroad's breach of its duty)

CONCLUSION

For the foregoing reasons and those set forth in the petition the petition for a writ of certiorari should be granted

Respectfully submitted

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SUPPLEMENTAL APPENDIX A

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

NO CT004175-03D2

THOMAS DAVID JORDAN,
Plaintiff,

vs

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, A Corporation and NORFOLK SOUTHERN RAILWAY COMPANY, A Corporation

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OBJECTIONS TO COURT'S CHARGE

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[1] BE IT REMEMBERED, that the excerpt of the above captioned Cause came on to be heard on the 7th & 8th days of February, 2006, beginning at approximately 10 00 a m before the HONORABLE JAMES RUSSELL, Judge Presiding, when and where the following proceedings were had to wit

* * *

[12] THE COURT Let s look on down to the bottom of Page 8 where we'll pick up with the beginning of the instructions that apply to the— explain the legal concepts that apply to everyone

Again, this is taken straight almost from the TPI in certain instances, to fit our case That covers pages, the bottom of Page 8 through the top of Page 13 Any questions, comments suggestions or changes either by way of addition or deletion?

MR GIBSON Norfolk Southern has no objection to that portion of the Charge through the top of Page 13

MR KEITH Judge I really have no objections But I'm just a little bit concerned, I guess As you know the standard of causation is different under a FELA claim versus Burlington Northern

Your Honor instructed them on proximate cause as it relates to Norfolk Southern, but that [13] doesn't apply Your Honor just read the Rogers decision, actually We've just covered that ground Just not—I think that I see what's going on I think in terms of the preponderance of the evidence and all that, that s fine There's a difference between a legal cause and proximate cause

MR GIBSON I will say this We prefer language centered around proximate cause to legal cause going back to the old days And if Mr Keith wants to use the old TPI proximate cause language, we would prefer that

MR KEITH No We ain't going to use that

THE COURT Let me make this comment and see what you think One of the reasons I wanted to take another look at Rogers was because we have a situation—we re probably going to get into this more specifically when we get around to the verdict forms

Frankly if you looked at the verdict form that Mr Spencer prepared, you d see he s approaching this conceptually different I've wrestled with that aspect of it because you have a [14] comparative fault case As far as I know there s been no decision rendered by any appellate court in Tennessee or any other jurisdiction that deals with the concept of compara tive fault in an FELA world

And I was trying to capture notions of comparative fault The thing I was looking back at Rogers for was to see how the Supreme Court discussed negligence issues Sure enough, they even—it makes reference to the term "fault,' and that concept is captured in Rogers I thought, well that's good it helps

There seems to be no reason why not to blend comparative fault into the whole picture, and so that's what I've tried to do Frankly, using fault terminology and concepts if you think about it, the FELA is the mother of all comparative fault I mean, that's where it all began How much further do we need to go?

MR KEITH I think I agree with all that I agree with the way Your Honor has approached it from that perspective I think my concern is going to be addressed more specifically when we talk about the FELA and the railroad I [15] think we can talk about it, if we need to, then

MR GIBSON Your Honor, if I may When we get into the next phase,—I guess that's where we're going—I'll just state that Norfolk Southern prefers the alternate instruction beginning the middle of Page 14 to the instruction that immediately preceded it

THE COURT Actually, the term "alternate instruc tion" was to have been deleted in this draft

MR GIBSON It all goes in?

THE COURT It all goes in

MR GIBSON I have no objection to that

THE COURT That heading was to have been taken out If I m in the right place—I'm in the right place And, yes, that heading was to have been deleted

* * *

[28] THE COURT I think in being good stewards of our time, the best way to approach this [29] is to go through, almost paragraph by paragraph and see if there is any objection or suggestion from anyone

At the top of Page 15 there is the language that you see in just about every FELA case "A railroad is not an insurer of the safety of its employees " Anything wrong with that?

MR GIBSON No, sir

THE COURT Mr Keith?

MR KEITH I m sorry, Judge, I m trying to flip where you are

THE COURT Page 15

MR KEITH No objection

THE COURT The next paragraph No liability may be imposed upon the railroad unless the evidence disclosed proves that it failed to exercise reasonable and ordinary care, that any such failure in whole or in part, legally caused the injuries of the Plaintiff

MR GIBSON No objection by Norfolk Southern

MR KEITH I see where Mr Barber objected to these instructions Judge, what I think—you ve already established the burden one [30] time with the general instructions, now you're basically establishing them again I think technically it's right

Right there which comes back to my explanation you use the language 'in whole or in part But nowhere has it been defined where you got that language and why we have that language, and that that is the standard of legal causation under the

FELA which I think is very important It's just thrown out to them And that would be my objection on that basis

THE COURT Actually, I quoted from the statute "in whole or in part" on Page 14 If that's an objection, the objection will be overruled and the Charge will be as given here Let's go to Unavoidable Risks or Dangers

MR GIBSON No objection by Norfolk Southern

MR KEITH I've never seen it before, I had not ever—I don't guess I have any objections to it I don't like it But I think that, I do think that it's overly heavily-skewed to the railroad

THE COURT Let's move on to Defect or [31] Insufficiency in Tracks or Equipment

MR GIBSON There's only one objection I have Your Honor, on Page 16 I have filed a brief in support of our request for instruction number one, which addresses the language from Rogers, quote, "even the slightest," closed quote, and why it's not applicable

And may I just stand on that brief and enter an objection only to that clause quote "even the slightest appearing in this draft on line five Page 16?

THE COURT Are you suggesting that the "even the slightest" words be taken out of that paragraph when it's used everywhere else?

MR GIBSON That's the substance of the brief, Your Honor The brief covers earlier decisions by the U S Supreme Court and some subsequent commentaries in cases It reaches the conclusion that the U S Supreme Court denied for that to be a part of an instruction on causation to the jury

THE COURT Well, do you suggest taking it out of this paragraph and leaving it everywhere else or are you suggesting taking it out [32] altogether?

MR GIBSON Altogether Bear in mind, I'm not talking about "in whole or in part,' I m talking about "even the slightest "In whole or in part," of course, is in the statute I don't object to that

I think this is the only place where you have "even the slightest" If you've got it anywhere else, I object to it anywhere else but hadn't spotted it You've got 'in whole or in part" throughout the instructions regarding the railroads' duties and I cannot object to that because it s in the statute

MR KEITH Judge, I hope that—I dang sure hope we get a verdict in this case for us But in the event that we don t, then I would welcome you to take that out because I know I'll win on appeal

That is the standard of causation under the FELA which is exactly the point I was just driving home a minute ago It says Legal cause of damage—we can go pull Rogers, you just read from that and that s what it said That's what Rogers and the United States Supreme Court and [33] every court that's interpreted it says

Legal cause of damage or complaint Any part, no matter how small,—and that s really the standard—in bringing about or actually causing the injury or damage

THE COURT Well frankly, I may have missed the point of your brief, Mr Gibson If you ll bear with me a second I think I need to get it off my desk

(Judge retrieves documentation)

MR WILLIAMS, SR Your Honor, is there any reason for the corporate representatives to stay here or can they leave?

THE COURT Thank you I'm as comfortable as you are there's no reason for any of the parties to stay unless you want to and want to be a part of, or consulted in, any of this I take that as a request that all the folks seated behind counsel table be allowed to leave if they like

(Parties exit courtroom)

THE COURT I wasn't real sure when I read this—I want to take up the requested instructions one by one from everyone, and I'm not [34] sure if now is the time to get into Norfolk Southern's Request No 1 which was supported by significant memorandum points and authorities

I didn't get the notion, Mr Gibson that this brief was intended to go into the esoteric rationale behind the language "even the slightest" And I made a point as I was ruling on the Motion for Directed Verdict and in reviewing the Rogers case I think I commented that there are legal pundits who have written I think somewhat extensively, on the point of the language "even the slightest"

There's that school of thought that would argue that the language even the slightest" was not intended as a measure of damages to be explained to the jury and used in jury instructions Rather, it was intended as a standard of review for appellate courts when they look at the trial record to determine if there is any evidence—material evidence to support a verdict

And what would be argued there is the appellate courts are to be governed by this "even the slightest

language, not juries Frankly, is [35] that where you re pitching this or are we going in a different direction?

MR GIBSON The brief is a little bit different It's not so much appellate standard as it is talking in terms of multiple parties in these cases To me, the crux of the brief is the language "proximate cause" The damage is done to the language of proximate cause when "even the slightest" is added to the causation instruction

That the intent of the act, and the decision by the Supreme Court is to use that "in whole or in part" to define the railroad's exposure to negligence standards That's the way I see it

THE COURT Is the suggestion now up for discussion to delete the use of the words "even the slightest" here and everywhere else?

MR GIBSON If it appears anywhere else I've missed it if it does

THE COURT It appears in the very next sentence

MR GIBSON Then twice

THE COURT It's there in other places, too

MR GIBSON And anyplace that it [36] appears I'm sorry I just I hadn't had time to review this as carefully as I would like I've missed all of those except the one I called the Court's attention to The intent of the objection was to take that language out wherever it might appear

THE COURT Well without going back over the Rogers case and all that we've said earlier,—even in connection with the Motion for Directed Verdict—if the suggestion as I understand it is to delete any use of the phrase 'even the slightest " the Court is of

the considerate opinion that that phrase is so deeply entrenched in the law of FELA cases, that it has become a part of the jury instructions with regard to, at least, every FELA case this Judge has been involved in, either as a trial lawyer or now as a sitting judge, and that it should not be removed and should be included in the Charge to the jury

MR GIBSON Your Honor Norfolk Southern has no objection to the Safer Manner of Doing Work also on Page 16

MR KEITH Your Honor could I make this suggestion? I don't know if it makes any [37] difference or not Just the way—here's how my simple mind reads these instructions

I think they're well written instructions I think Your Honor's done a good job On the flow of it first at one point it starts talking about what our obligation is, then the railroad doesn't have to do this, this and that

I would recommend that we take the bottom of Page 15 where it says, "The law under which Plaintiff brings this action ", and I would recommend that we take that paragraph and pull it up to the top of the page, up to right before where it says "A railroad is not an insurer of the safety of its employees," on that same page Also, where it talks about safer manner of doing work,' pull that up here too

Then what'll happen is after that point we should start talking about what the FELA is not and why it's not an insurer of its employees safety I don't know if that makes a difference I think that may be the biggest problem I have reading this, and I think that may be why Mr Barber thought it was unfair too

I think what I see going on is really [38] kind of jumping around Let's talk about how good it is and talk about this, this this I think if it first talks about the obligations of how we prove our case, and then it talks about what the railroad doesn't have to do, if we set it up in that kind of order, I think we flow better and I think it would be more balanced

MR GIBSON I didn't follow any of that I'm sorry Your Honor I can't comment 'till I see it on paper and I didn't follow any of that

MR KEITH I guess—here's what I'm talking about Page 14 It starts out on Page 14—maybe I can make my point more clear—and it says it first sets out what is the FELA and essentially what the FELA is X, Y, and Z And then right under where you have the Alternate Instruction, which will be deleted, it says it is established in this case that certain things under this statute have already been proven and are agreed to

Then you go and state, "This is a negligence action This means that before Plaintiff can recover, he must prove that his [39] injury resulted in whole or in part, from the negligence or fault of this Defendant "

We've got the issue with the Workers' Comp thing After that what I would suggest is we go right into "The law under which Plaintiff brings this action provides that Defendant shall be ", and it talks about what their obligations are under this law

And it gets into, you go on into 'even the slightest" It talks about the duty of the railroad under this law and the duty of the Defendant to use ordinary care and provide suitable tools Then you get into the notice thing

I think at the end, what we would do is put in this stuff about the railroad is not an insurer of the safety of its employees' negligence and no liability may be imposed upon the railroad unless the evidence -and that's how you wrap it up, and then you get into our negligence And it makes sense, what I m saying to the Court I think that is a more balanced way of approaching it

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SUPPLEMENTAL APPENDIX B

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS SHELBY COUNTY

NO CT004175 03D2

THOMAS DAVID JORDAN,
Plaintiff,

VS

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, A corporation and NORFOLK SOUTHERN RAILWAY COMPANY a corporation,
Defendant

DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S RULE 50 02 AND 59 02 MOTIONS

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[1] Defendant, Norfolk Southern Railway Company ("Norfolk Southern') pursuant to Rule 50 02, Tennessee Rules of Civil Procedure, moves the Court to set aside the verdict returned in this case and the judgment entered on the verdict and to enter judgment in accordance with Norfolk Southern's motion for a directed verdict Grounds for this motion are

At the close of all of the proof, Norfolk Southern moved the Court to direct a verdict in its favor on the grounds that the sole basis for recovery alleged against Norfolk Southern was failure to furnish a safe place to work because of close track clearances and that the proof established that Norfolk Southern

was in compliance with T C A § 65 6 205(d), the controlling standard on track clearances The Court denied [2] the motion, Denial of the motion was erroneous and should be corrected on this post trial motion

Alternatively pursuant to Rule 59 02, Tennessee Rules of Civil Procedure Norfolk Southern moves the Court for a new trial on the following grounds

1 The verdict and the judgment entered on the verdict are excessive

2 The verdict is so excessive as to indicate passion, prejudice or caprice on the part of the jury

3 The verdict is against the weight and pre ponderance of the evidence

4 The Court erred in giving its instructions to the jury in the following respects

The Court, over the objection of Norfolk Southern, instructed jury as follows

> The law under which plaintiff brings this action provides that defendant shall be liable for injury resulting "by reason of any defect or insuffi ciency due to its negligence, in its cars, engines, appliances machinery, tracks, roadbeds, work, or other equipment" This statutory provision does not mean that the railroad employer is responsible for injury of an employee merely because it was caused by some defect or insuffi ciency of one of the items referred to To the contrary, the statute imposes liability on the railroad employer only when the defect or insuf ficiency is due to negligence, *even the slightest*, on the part of the employer If there is an injury as

> the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, *even the slightest* on the part of the railroad (Emphasis supplied)

[3] This instruction was erroneous The degree of negligence to be applied in this case is correctly stated in Norfolk Southern s request for Instruction No 1, denied by the Court, which reads as follows

> If you find that the railroad was negligent, you must next determine whether the railroad's negligence caused the plaintiff's injury in whole or in part You need not find that the railroad s negligence was the sole cause, but you must find that it was a proximate cause of the plaintiff's injury In order to find that it was a proximate cause you must find that the injury was the nature and probable consequence of the railroad's negligence, and that the railroad's negligence was a substantial factor in bringing about the injury
>
> You may not find that the railroad s negligence was a proximate cause if it merely created an incidental condition or situation in which an accident otherwise caused, resulted in the plaintiff's injury

In support of its contention that the Court committed error, Norfolk Southern incorporates into this motion by reference the contents of its brief in support of jury instruction request No 1, filed in this cause on February 3, 2006

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SUPPLEMENTAL APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE,
WESTERN SECTION

Shelby County Circuit Court
No CT-004175-03

THOMAS DAVID JORDAN,
Plaintiff/Appellee,

v

BURLINGTON NORTHERN SANTA FE
RAILROAD COMPANY, a corporation,
Defendant/Appellee/Counter Appellant,

No W2007 00436 COA-R3 CV

NORFOLK SOUTHERN RAILWAY
COMPANY, a corporation
Defendant/Appellant/Counter Appellee,

BRIEF OF APPELLANT,
NORFOLK SOUTHERN RAILWAY COMPANY

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* * *

[31] While the main opinion clearly states that (1) common law principles apply to the FELA unless expressly rejected and (2) the proximate causation standard applied at common law to the issues of negligence and the issue of contributory negligence The main opinion fails to spell out the obvious conclusion that *proximate cause* is the appropriate

standard in FELA cases, not a watered down version of both causation and negligence as suggested by some courts

In a concurring opinion, Justices Souter, Scalia and Alito joined in the opinion drafted by Chief Justice Roberts, but went one step further and announced the appropriate [32] causation standard in FELA cases to correct the misconceptions subsequent to the *Rogers* decision Specifically, the concurring opinion states the following

> **Despite some courts' views to the contrary, *Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm, the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury**

Id at 809 (emphasis added)

The concurring opinion reiterated the statements in the main opinion as follows Prior to FELA it was clear common law that a plaintiff had to prove that a defendant s negligence caused his injury proximately not indirectly or remotely " *Id* at 810 The concurring opinion also stated the following

> FELA changed some rules but as we have said more than once, when Congress abrogated common law rules in FELA it did so expressly FELA said nothing, however, about the familiar proximate cause standard for claims either of a defendant employer s negligence or a plaintiff employee s contributory negligence and through out the half century between FELA's enactment and the decision in *Rogers*, we consistently

recognized and applied proximate cause as the proper standard in FELA suits

* * *

Rogers left this law where it was We granted certiorari in *Rogers* to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes

* * *

True, I would have to stipulate that clarity was not well served by the statement in *Rogers* that a case must go to a jury where "the proofs justify with reason the conclusion that employer negligence played any part even the slightest, in producing the injury or death for which damages are sought' *Ibid* But that statement did not address and should not be read as affecting the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations It spoke to apportioning liability among parties, each of whom was understood to have had some hand in [33] causing damage directly enough to be what the law traditionally called a proximate cause

The absence of any intent to water down the common law requirement of proximate cause is evidence from the prior cases on which *Rogers* relied

Id at 811

The concurring opinion points out that just eight years prior to the *Rogers* decision in *Coray v Southern Pacific Co*, 335 U S 520, 'Justice Black unambiguously recognized proximate cause as the standard applicable in FELA suits" *Id*

In the instant case, the trial court instructed the jury based upon the so called "watered down" version of causation and negligence This Court should enter an order granting Defendant Norfolk Southern a new trial such that Plaintiff in the instant case bears the burden of establishing the fundamental elements of negligence—duty, breach, causation, and damages—as stated by the United States Supreme Court in *Coray* and *Sorrell* Justice would not be served by allowing a $4 000 000 verdict to stand on an incorrect standard of causation and negligence

* * *